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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 718

OMRI E. DANIELS, JR., BARGE HISKEY AND BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO AND MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN TRANSCRIPT OF RECORD.

BENTLEY M. McMULLIN,
Counsel for Petitioners.

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4 Corpus Juris 1182, Appeal and Error, Sec. 3218, n. 38 25
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SUPREME COURT OF THE UNITED STATES

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No. 718

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vs.

C. SEWELL THOMAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

May it Please the Court:

Your petitioners, Omri E. Daniels, Jr., Barge Hiskey, and Bentley M. McMullin respectfully petition this honorable Court for a writ of certiorari to the Supreme Court of the State of Colorado, and respectfully represent and show as follows, to-wit

Preliminary Note

References (e. g., R. 1) are to the numbers of the pages in the record. These page numbers are the numbers which are written in black ink on the lower left hand corner of the pages of the certified copy of the transcript of the record.

Summary Statement of the Matter Involved

This is a proceeding begun in 1948 in the District Court of the City and County of Denver, State of Colorado, by petitioners Daniels and Hiskey, against respondent Thomas. (R. 219-222) The purpose of the proceeding was to compel Thomas to convey to Daniels and Hiskey certain real property which Thomas held as the trustee of a resulting trust. (R. 221-222) Petitioner McMullin appeared throughout this entire proceeding as the attorney of record for Daniels and Hiskey. (R. 222, 44)

After the proceeding had been begun, Thomas alleged that he had discovered that interests in the property were outstanding both in McMullin and in certain other persons who were related to Daniels. Thomas alleged that it was therefore necessary that the holders of these alleged interests, including McMullin, be made parties to the proceeding. (R. 347, 354-356) Thomas asked that the court might instruct him as to whom the property should be conveyed to. (R. 357) He also prayed for an award of costs, including his attorney's fees to be allowed him out of the property. (R. 358)

McMullin immediately disclaimed all interest in the property, and thereafter continued to disclaim, making, in all, a total of five disclaimers. (R. 370, 372; 429, 436; 442; 673, 674) Since he claimed no interest in the property, he objected to being made a party to the proceeding. (R. 429) He was, however, made a nominal party solely for the purpose of determining the true ownership of the property, (R. 386) and upon the understanding, clearly expressed in the record, that if he disclaimed, as he had done, he should not be liable for costs. (R. 430) At no point in the entire proceedings was there a claim of any nature or in any amount ever made against McMullin.

Thereafter, and in 1950, the court ordered Thomas to convey the property to Daniels and Hiskey (R. 724) and he did so. (R. 738) By the order referred to, the court determined that McMullin had no interest in the property. (R. 723, 724) Excepting as he thereafter appeared in the case as attorney for Daniels and Hiskey, McMullin had no further connection with the litigation.

In 1952 the claim made by Thomas for reimbursement out of the property for his attorney's fees came on for trial. (R. 44) At no time prior to, nor upon this trial was any claim of any kind made against McMullin. McMullin was given no notice, actual or constructive, of a claim against him of any kind or in any amount. He had no reason to anticipate that such a claim would be made, for the court had declared that there was no such issue in the case. (R. 430) No evidence in support of a claim against him was offered or received; no hearing or trial on such a claim was had. Nevertheless, without claim, notice, evidence, hearing or trial as to McMullin (R. 44-180) the trial court awarded Thomas judgment for his attorneys fees. The judgment was for $2,500.00 and costs, and it was entered not only against Daniels and Hiskey but against McMullin as well. (R. 189) The award did not provide for the payment of this amount out of the property; it was a personal judgment. (R. 189)

The judgment against McMullin was entered notwithstanding the fact that the court had declared him to be without interest in the property. (R. 723-724) It was entered upon a trial in which he had not participated except as counsel for Daniels and Hiskey. It was entered in the entire absence of any claim, notice, evidence or hearing upon which such a judgment could properly be based. The entry of judgment against McMullin therefore violated the due process of law clause of the 14th Amend-

ment to the Constitution of the United States. As to him the judgment was and is a nullity. The invalidity extends to the entire judgment and renders it void as a whole and as to each of the three judgment debtors.

Jurisdictional Statement

(A) The judgment which is sought to be reviewed.

On January 8, 1953, the District Court of the City and County of Denver and State of Colorado entered judgment for $2,500.00 and costs in favor of the respondent Thomas and against the petitioners Daniels, Hiskey and McMullin. (R. 184-190) There was only one judgment; separate judgments were not entered. (R. 189) On the Court's own initiative, the necessity for filing a motion for a new trial was dispensed with. (R. 182)

On writ of error to the Supreme Court of the State of Colorado, regularly issued and entertained by that Court, the judgment of the District Court was affirmed, without written opinion, on January 11, 1954. (R. 997-998) A petition for rehearing, regularly filed and entertained, was denied on February 1, 1954. (R. 999-1000) On February 10, 1954, the plaintiffs in error moved for leave to apply for a remedial writ to correct the judgment, (R. 1006-1011) and this motion was denied on February 23, 1954. (R. 1018)

The judgment sought to be reviewed in this proceeding is the final judgment of the Supreme Court of the State of Colorado. The Supreme Court of the State of Colorado is the highest court of that state in which a decision could be had.

This petition, together with a duly certified transcript of the entire record in the case as the same appears in the Supreme Court of the State of Colorado, has been filed within ninety (90) days from the date on which the Supreme

Court of the State of Colorado denied the petition for rehearing.

(B) The statute which gives this court judisdiction.

28 U. S. C. A. 1257 (3) gives the Supreme Court of the United States authority and jurisdiction to review the aforesaid judgment of the Supreme Court of the State of Colorado. This statute, so far as it is here applicable, is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . .
> "(3) By writ of certiorari, where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

(C) The question presented as a substantial question.

The judgment against the involuntary plaintiff was entered in the entire absence of a claim which would support the judgment. This lack of a claim was never corrected or waived by any subsequent notice, evidence, hearing, trial or the finding of any fact which could support a judgment. There was no semblance of due process of law in the entry of the judgment, and it is void as having been entered contrary to the requirements of the due process 14th Amendment to the Constitution of the United States. It is a single judgment, not severable, and it must be set aside as a whole. The entry of such a judgment was a flagrant, unprecedented abuse of the judicial power by the courts of the State of Colorado. There is no possible theory on which such a judgment could be upheld.

(D) The stage of the proceedings at which, and the manner in which, the federal question sought to be reviewed was raised.

It was impossible to have raised the federal question in the trial court.

The proceeding was begun by petitioners Daniels and Hiskey, as plaintiffs, against respondent Thomas, as defendant (R. 219). Petitioner McMullin never asserted any rights in the real property in question (R. 370) and repeatedly disclaimed (R. 370, 372; 429, 436; 442; 673, 674). When he was made a party to the proceedings, over his objections (R. 363, 429), he should have been designated a party defendant; and he would have been so designated except for the fact that he was acting as the attorney for the plaintiffs, so that if he had been designated as a defendant, he would have appeared to be acting as attorney against himself as defendant; and, for that reason he asked to be, and was, aligned as an involuntary plaintiff (R. 429-430). When he was made an involuntary plaintiff it was with the express understanding, clearly stated by the court (R. 430) that he would not be liable for costs if he disclaimed, as he had done, and as he thereafter repeatedly did (R. 370, 372; 429, 436; 442; 673, 674). His own interest in the litigation was purely nominal, and after he had been made a party and on January 21, 1950, the trial court made a specific finding (R. 723) that he had no interest, and with his consent (R. 722) entered an order debarring him from the assertion of any interest in the property on his own behalf (R. 724-725). This order ended the litigation so far as McMullin was concerned. Thereafter he did not appear in the case in any capacity except as attorney for Daniels and Hiskey. There was nothing in any of these proceedings which would have warned him that a judgment for costs might be entered against him. On the contrary, he was justified, in view of these proceedings, in assuming that no such judgment could or would be entered. There was no way by which McMullin could have anticipated the entry of the judgment or by

which he could have made any objection to the judgment in advance of the time on which it was actually entered.

When the case came on for trial upon the claim of respondent Thomas for the allowance of his attorney's fees and other costs (R. 44-179) McMullin did not appear except as counsel for Daniels and Hiskey. (R. 44) Neither in the opening statements, (R. 45-67) nor anywhere in the progress of the trial (R. 68-178) was there any mention of a claim against McMullin; nor was there any notice of such a claim, or any evidence in support thereof, or any hearing or trial regarding it. (R. 44-179) These circumstances also made it impossible for McMullin to object to the entry of judgment against him in advance of its actual entry.

The entry of this judgment raised substantial questions of the sufficiency of the evidence and of law. Not only was McMullin improperly made a party to the judgment; the maximum amount for which Thomas made claim against Daniels and Hiskey under his third counterclaim was $1,425.00 (R. 120, 124, 164) which was $925.00 less than the amount of the award. The amount awarded was therefore arbitrarily increased, apparently on account of the liability of the additional judgment debtor. A number of other errors were alleged to have occurred in the proceeding, as may be seen from the briefs. (R. 992-994) Under Colorado practice, questions of such a substantial nature could be raised only by a motion for a new trial.

Rule 59 C (a) of the Rules of Civil Procedure for Courts of Record in Colorado (1 Colorado Statutes Annotated, 1935, Replacement Volume 1941; 107 Colorado, Appendix) provides, in part, as follows:

> "A new trial may be granted to all or any of the parties, and on all or part of the issues, after trial by jury, court or master. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional

testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. Subject to the provisions of Rule 61, a new trial may be granted for any of the following causes: * * *.

* * * * *

(5) Excessive or inadequate damages.
(6) Insufficiency of the evidence.
(7) Error in law."

Rule 61, referred to in the above quotation provides that harmless error may be disregarded.

Rule 59 C (e) further provides that:

"The party claiming error in the trial of any case must, unless otherwise ordered by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review."

Under the authority of the paragraph last quoted, the trial court contemporaneously with the entry of judgment, and on its own initiative, entered an order dispensing with a motion for a new trial. This order had the effect of making the judgment of the trial court a final judgment; it was, in effect, a denial of any motion for a new trial which might otherwise have been filed; and if a motion for a new trial had been filed, it would have been stricken. As was said in *Dickson* v. *Horn,* 89 Colo. 234, 237; 1 Pac. (2d) 96, 97 (1931):

"It is said that the judgment was not final because the motion for a new trial was pending. The court had regularly ordered that the necessity for filing this motion was dispensed with, and this order, in effect, is a denial of any motion for a new trial, which might otherwise have been filed. When an order is entered dispensing with the necessity of filing a motion for a

new trial, the defeated party cannot postpone the final determination of the cause by filing such motion. It should be stricken. * * * "

If there were any objections to the regularity of the proceedings, they were, in effect, all overruled by the order dispensing with a motion for a new trial. The judgment debtors, the petitioners herein, therefore had no opportunity to call attention to the invalidity of the judgment until the case had reached the Supreme Court of the State of Colorado.

Since the first opportunity which the judgment debtors had to object to the entry of the judgment upon the ground that it was entered in violation of the 14th Amendment to the Constitution of the United States, or otherwise, was in the Supreme Court of the State of Colorado, the federal question, if raised by them in the Colorado Supreme Court, would appear to have been raised in apt time. This conclusion would seem to follow from the language used by this Court in the following cases:

Missouri ex rel Missouri Ins. Co. v. *Gehner,* 281 U. S. 313, 320; 74 L. ed. 871, 875 (1940)

"It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition in the state court for rehearing where the petition is denied without more. (Citing authority). But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the action as violative of the Constitution and laws of the United States." (281 U. S. at p. 320)

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U. S. 673, 677; 74 L. ed. 1107, 1111 (1930)

"The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted in addition to its claims on the merits, that, in applying the new construction of Article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. (citing case last above) * * *." (281 U. S. at pp. 677, 678)

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 366, 77 L. ed. 360, 367 (1932)

" * * * We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (citing authority) we are not required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (citing authority), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. (Citing two cases last above cited, and one additional case.) * * * " (287 U. S. at pp. 366, 367)

The quoted language would seem to indicate that a federal question is raised in apt time, even if never presented except on a petition for rehearing, if that was the first opportunity to raise the question which was available to the objecting party.

The proceeding to review the final judgment of the District Court of the City and County of Denver was by writ of error from the Supreme Court of the State of Colorado (Rule 111 a). A writ of error was duly issued, and in the

proceeding which followed in the Appellate Court the judgment debtors and petitioners herein were the plaintiffs in error and the judgment creditor and respondent herein was the defendant in error.

Under the former practice the plaintiff in error in such a proceeding would have been required to file a "Specification of Points", specifically designating each point upon which he relied for reversal of the judgment of the lower court. The rules formerly provided (Rule 111 f) that:

> "Each such specification shall set out separately and particularly each point relied upon."

This provision, however, is no longer in effect.

By amendments to the Colorado Rules adopted on November 12, 1952, and effective on February 12, 1953, (published only in the January, 1953, issue of Dicta, the monthly journal of the Denver and Colorado Bar Associations and the University of Denver College of Law; see Dicta, p. 17, Rule 111(f)) applicable to the present proceeding, it is provided that:

> "No assignments of error, assignments of cross error, or formal joinder in error, nor any specification of points, shall be filed. In lieu thereof, each party in his brief in his summary of the argument required by Rule 115 (c) shall state clearly and briefly the grounds upon which he relies in seeking a reversal or modification of the judgment or the correction of adverse findings, orders or rulings of the trial court. He will be limited to the grounds so stated, although the court may, in its discretion, notice any error appearing of record."

The meaning of Rule 111(f) as now amended has never been discussed or construed by the Colorado Supreme Court, but it must of course be true that the new rule is a modification and change of the former rule. The former

rule required that each point relied upon should be stated separately and particularly (i. e., in detail—Webster). Under the present rule particular statement is no longer required. Instead, it is now provided that the point relied upon shall be stated briefly. This change in requirements for raising issues in the Colorado Supreme Court cannot mean otherwise than that the particulars of the objection no longer need to be set forth in advance of the argument, and that all that is required is a brief statement as to the general nature of the point involved, the particulars of which are to follow. In other words, the change in the rules must mean that a point briefly and clearly stated in the summary of the argument can be supported by particulars in the argument itself, and that those particulars, if they relate to the point briefly stated in the summary, will be properly before, and can be considered by, the Court. If this were not true, the change in the Rules would have no meaning.

The Colorado Rules provide, by Rule 115 (b), as amended, that the plaintiff in error shall file a brief, the defendant in error shall file a brief, and that plaintiff in error may file a reply brief. The rules provide that the brief of the plaintiff in error shall contain, in addition to certain formal matters, a statement of the case, a summary of the argument, and an argument. The rules also provide that the brief of the defendant in error shall contain, in addition to certain formal matters, a statement of the case if the defendant in error disagrees with the statement contained in the brief of the plaintiff in error, a summary of the argument and an argument. The reply brief is:

> "confined strictly to answering new matters raised by the adversary's brief" (Rule 115 (c) as amended).

In their opening brief in the Colorado Supreme Court, the plaintiffs in error set forth a summary of their argument

(R. 992; brief of Plaintiffs in Error, pp. 25-26). This summary contained the following paragraph:

> "C. The entry of judgment against the involuntary plaintiff (McMullin) for $2,500.00 was erroneous, in that no claim for a money judgment was ever made against him."

It will be noted that the summary of the argument does not enumerate or state the reasons why the absence of a claim for a money judgment against the involuntary plaintiff rendered the judgment erroneous. Those reasons remained to be more particularly stated and developed in the argument, as the amended rules contemplate should be done. Any reason which would logically support the statement in the summary of the argument might be stated and developed in the argument, and if so stated and developed would properly be before the court.

Now one reason why a judgment entered in the entire absence of a claim is erroneous is this: due process of law requires that a claim must be made upon which there can be a judgment. If there is no claim, and if judgment is nevertheless entered, the judgment is entered without due process of law and in violation of the 14th Amendment to the Constitution of the United States. That reason, therefore, was one reason which could be logically urged upon the court in support of the statement in the summary of the argument. If so urged, it would be properly before the court. It was also proper to show that the lack of a claim was never corrected by any subsequent notice, demand, or evidence, and was not waived by acquiescence in a trial.

All those matters were uged, and were properly brought before the court for its determination, in the argument which followed.

In the opening brief of the plaintiffs in error the complete argument upon this part of the summary was as follows (R. 992; Brief of Plaintiffs in Error, pp. 44-45):

> "The order of November 16, 1948 (f. 421) made the involuntary plaintiff a party to this proceeding
>
> > 'solely for the purpose of the determination of the third counterclaim of the defendant C. Sewell Thomas herein as amended, and for no other purpose' (f. 424).
>
> No demand for a money judgment against the involuntary plaintiff was made in the amended third counterclaim or in any other pleading or motion in the entire proceeding. The amended third counterclaim asked merely that the involuntary plaintiff be required
>
> > 'to set up (his) claim, if any, to ownership of all or part of the real estate referred to in this counterclaim' (F. 348).
>
> "On November 12, 1948 (f. 375-6), November 15, 1948 (f. 550), December 24, 1948 (f. 579) and January 14, 1950 (f. 1193), the involuntary plaintiff disclaimed (f. 1193). The order of January 21, 1950, found that the involuntary plaintiff had no interest in the property (f. 1333). The order of January 21, 1950, which determined all of the issues which then remained for further consideration, did not reserve for further consideration any issue relating to the involuntary plaintiff (f. 1330). After January 21, 1950, the involuntary plaintiff was not required to, and he did not, participate in the proceedings. He did not participate in the trial as a litigant. The involuntary plaintiff was simply an innocent by-stander who, when the trial court 'threw the book' at the plaintiffs, happened to be in the way."

To this argument the defendant in error made answer as follows (R. 993; Brief of Defendant in Error, p. 24):

> "McMullin (the involuntary plaintiff) was the moving factor in the law suit and it is only fair and just

that he be made to bear a proportionate share of Thomas's expenses. The prayer of the counterclaim asked for such and other further relief as to the court may seem proper. Under rule 54 E. Thomas was entitled to any relief which the facts justified and was not limited to the prayer of his counterclaim. Daniels and Hiskey are liable on the judgment, and while McMullin is also legally liable thereon, Thomas has no disposition to enforce the judgment against McMullin, but is content to leave McMullin to settle with his own clients in this regard."

By this argument the defendant Thomas made the contention that even if there was no prayer or demand for judgment against the involuntary plaintiff McMullin, the judgment could still be sustained as a general exercise of the trial court's supposed right to grant any relief "which the facts justified."

To this argument the plaintiffs in error replied as follows (R. 994; Reply Brief of Plaintiffs in Error, pp. 30-31):

"But the defendant says (Deft's. Brief, p. 24):

'Under Rule 54 E (the citation should read Rule 54 c) Thomas was entitled to any relief which the facts justified and was not limited to the prayer of his counterclaim."

He says that the judgment against the involuntary plaintiff was therefore proper. But in a case decided by this Court of July 6, 1953, namely, *Clemann* v. *Bandimere,* No. 17037, this court has held, as the Bar Association headnote states, that

'No issue is in a case which was not raised by the pleadings or tried with the express or implied consent of the parties.'

A judgment without some notification of claim, entered without evidence, procured without a trial of the

> claim, and with no opportunity given to make a defense, would hardly seem to be a valid judgment. In fact, such a judgment would appear to be in complete violation of the rights which are granted to litigants by the Constitution of the State of Colorado and by the Fourteenth Amendment to the Constitution of the United States." (Emphasis ours.)

By the course of the foregoing argument the contention that the judgment was invalid under the Fourtenth Amendment to the Constitution of the United States was fully and fairly presented for the consideration of the Supreme Court of the State of Colorado.

There was no further argument; a motion for oral argument (R. 995) was denied (R. 996).

On January 11, 1954, the Supreme Court of the State of Colorado affirmed the judgment of the District Court of the City and County of Denver, without written opinion (R. 997).

A petition for rehearing was filed on January 22, 1954 (R. 999), in which it was stated (pp. 2, 3):

> "The trial court awarded judgment for $2,500.00 in favor of the defendant Thomas and against all of the plaintiffs in error, including the involuntary plaintiff McMullin.
>
> Never by written or oral statement in the entire record did the defendant Thomas ask for a money judgment against the involuntary plaintiff in any amount. No hearing was ever had upon a claim for the recovery of such a judgment. No evidence in support of such a judgment against the involuntary plaintiff was ever offered or received. No notice of the entry of such a judgment was ever given, and the involuntary plaintiff had no opportunity to object to it. No findings which could support such a judgment were ever made. Upon the entry of judgment, further objection and argument were dispensed with.

> The judgment is void. It is void in its entirety. Not only does it violate the rules and practices of the courts of this state; it violates Article II, Section 25, of the Constitution of the State of Colorado; it violates the due process clause of the 14th Amendment to the Constitution of the United States. See, for example,
>
> *Rude* v. *Buchhalter,* 286 U. S. 451, 460. No court could, in good conscience, when fully advised of the facts, permit such a judgment to stand."

This petition again called attention to the federal question. The petition for rehearing was denied, without opinion, on February 1, 1954. (R. 1000)

Article VI, Section 3, of the Constitution of the State of Colorado, gives the Supreme Court of the State of Colorado the power to

> "issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other original and remedial writs."

Rule 116 provides in part that

> "A party seeking to invoke the original jurisdiction of the supreme court shall set forth in his complaint the circumstances which render it necessary or proper that the supreme court exercise its original jurisdiction. Cases in which the court exercises such jurisdiction shall be governed by these rules, subject to the power of the court to prescribe different procedure."

Pursuant to these provisions, and on February 10, 1954, the plaintiffs in error filed in the Colorado Supreme Court their petition for leave to apply for a remedial writ, (R. 1006) and in their petition called attention to the fact that the judgment against the involuntary plaintiff was entered in violation of the due process of law clause of the Constitution of the United States (R. 1008, 1010). On January

23, 1954, the Colorado Supreme Court denied this petition without opinion (R. 1018).

From the foregoing it appears that the first opportunity given the judgment debtors to object to the judgment upon any ground was in the Supreme Court of the State of Colorado; that in that court the fact that the judgment was rendered in violation of the 14th Amendment to the Constitution of the United States was specifically, fully and fairly presented to the court prior to its determination of the issues and in a manner which, under the revised rules of that court, was sufficient to raise the question; and that, following the judgment of the court, its attention was again twice directed to the federal constitutional question, once by petition for rehearing and again by a petition directed to the original jurisdiction of the court.

The Question Presented

The principal question presented is whether a judgment against three judgment debtors, made, as to one of the judgment debtors, without a claim or demand for its entry, without notice, without evidence, without a hearing or a trial, and without an opportunity given to object to it, can, as to such judgment debtor, be a valid judgment, in view of the due process of law clause in the 14th Amendment to the Constitution of the United States.

A secondary question presented is whether a judgment which for reasons such as are stated in the preceding paragraph, is invalid as to one of three judgment debtors, against all of whom a single judgment is entered, and whose separate individual liabilities cannot be ascertained by reference to the record, must be held to be invalid as to all three of them.

The Reasons Relied On for the Issuance of the Writ

(A) Statement of the facts

On July 16, 1948, this proceeding was begun by the issuance of a summons (R. 241-242). It was an action brought by petitioners Omri E. Daniels, Jr., and Barge Hiskey, as plaintiffs, to compel respondent C. Sewell Thomas, as defendant, to convey to the plaintiffs certain real property held by him as the trustee of a resulting trust and to recover damages for his failure to convey the property to the plaintiffs (R. 219-222). After an answer and counterclaims had been filed by Thomas (R. 278-286) and after their answer to the counterclaims had been filed by Hiskey and Daniels (R. 289-290), and on September 11, 1948, Thomas filed a motion (R. 345-347; see 273-381) for leave to file an amended answer and counterclaims, which was tendered with the motion (R. 348-358).

The motion to amend alleged that since the date on which the original answer had been filed the defendant Thomas had learned that McMullin, and certain other persons who were related to petitioner Daniels, claimed interests in the real property in question, and that it was necessary for the defendant to amend his answer and counterclaims in order to make proper allegations regarding these newly discovered interests. The amended answer and counterclaims included an amended third counterclaim (R. 354) in which it was alleged that McMullin and the other persons referred to had interests in the property of which the defendant Thomas could not "ascertain the exact extent" (R. 355-356), and that the defendant Thomas could not make conveyance of the property until its true owners were judicially ascertained (R. 356). Thomas accordingly asked for instructions as to who the true owners were (R. 356-357). In his prayer for relief Thomas asked that McMullin and the

other persons referred to be made parties to the action, that they be required to set up their claims, if any, to ownership of the property (R. 357), that the court determine who the owners of the property were and instruct him as to his duty to convey (R. 357), and that he be awarded his costs and expenses, including attorney's fees, out of the property (R. 358). The prayer for recovery of costs was in the following language:

> "That the court decree that the cost and expense of the defendant, including attorney's fees in connection with this proceeding, and the obtaining of the instructions referred to above, be allowed to the defendant out of the property, which is the subject matter of this action."

There was no claim or demand for any other form of judgment against the involuntary plaintiff.

On November 15, 1948, Daniels and Hiskey filed affidavits opposing this motion (R. 363-372). The affidavits filed included an affidavit by McMullin (R. 370-372) in which he made the first of five full disclaimers as to the property (R. 370) and offered to execute such releases and further assurances and confirmations of his disclaimer as might be found proper (R. 372). A hearing on the motion was had on November 15, 1948 (R. 428, 384) at which hearing McMullin again made a full disclaimer (R. 429) and at which time he tendered a quit claim deed to the property, signed by him, the grantee to be as designated by the court (R. 429, 438). At this hearing McMullin urged that, in the interest of saving expense, no summons be served upon him; and he offered to accept service and to disclaim as to the property (R. 430). The trial court assured him that he would not be held liable for costs if he filed a disclaimer without more (R. 430) as he had done (R. 370, 372) and did (R. 429, 436; 442; 673; 674). By written order dated

November 16, 1948 (R. 385-387) the trial court then granted the defendant Thomas leave to file the amended answer and counterclaims and McMullin was made an involuntary plaintiff in the proceeding (R. 336). The relatives of Mr. Daniels who had interests in the property were named as defendants (R. 386) and McMullin's proper alignment as a party was also as a defendant. However, McMullin was acting as attorney for the plaintiffs Daniels and Hiskey, and if he were named a defendant, would appear to be suing himself. For this reason he was designated as an involuntary plaintiff (R. 429-430). He was made a party "solely for the purpose of the determination of the amended third counterclaim of respondent Thomas."

The amended third counterclaim of the respondent Thomas (R. 354-358) asked the court to decree that his costs and expenses, including his attorney's fees, be allowed him out of the property (R. 358). The language of the amended third counterclaim was as follows:

> "5. That the court decree that the cost and expenses of the defendant, including attorney's fees in connection with this proceeding, and the obtaining of the instructions referred to above, be allowed to defendant out of the property which is the subject matter of this action (R. 358). (Emphasis ours)

There was also, of course, the usual prayer for such other and further relief as to the court might seem proper (R. 358).

The summons which was issued on the amended third counterclaim contained a demand for the allowance of costs, including attorney's fees, out of the property only, and contained no further demand for judgment against any one (R. 478-481). McMullin promptly acknowledged service of this summons (R. 388-389) and filed a disclaimer (R. 442-443). On January 14, 1950, McMullin filed a still further and final disclaimer (R. 673-674).

On January 21, 1950, the trial court entered an interlocutory order (R. 722-725) which disposed of all questions in the case excepting certain questions reserved for further consideration (R. 724). This order expressly found that the involuntary plaintiff McMullin had

> "no right, title or interest in the subject matter of this action, as evidenced by (his) disclaimer filed herein" (R. 723)

The involuntary plaintiff was ordered to be

> "forever debarred from asserting any claim in and to the property described in the complaint herein, or against the plaintiffs and the defendant C. Sewell Thomas, in any manner by, through or under the issues involved in this action" (R. 724-725)

No issue regarding the involuntary plaintiff was reserved for further consideration (R. 723-725). Thereafter the involuntary plaintiff took no part in the proceedings except as attorney for the plaintiffs Daniels and Hiskey, nor was any further action in the proceeding taken or suggested by any one to be taken against him.

Trial of the issues under the amended third counterclaim was had on November 7 and 8, 1952 (R. 44, 136). At this trial petitioners Daniels and Hiskey appeared by petitioner McMullin as their attorney (R. 44). McMullin did not appear in the trial in any way except as attorney for the plaintiffs (R. 44-179). No claim against petitioner McMullin was made at any stage of the trial; the opening statements related solely to claims for liability made by or against petitioners Daniels and Hiskey and respondent Thomas; (R. 45-67) no evidence regarding any claim against the involuntary plaintiff McMullin was heard or received; (R. 68-178) no notice or intimation that judgment against him was in prospect was in any way given to the involuntary plaintiff.

On January 8, 1953, the trial court filed a seven page document entitled "Findings and Judgment" (R. 184-190). The judgment contained no reference to the involuntary plaintiff McMullin until the last two paragraphs, which read as follows:

> "Therefore the court finds in favor of the defendant C. Sewell Thomas and against the plaintiffs and the involuntary plaintiff on Thomas's cross-complaint.
>
> Judgment is entered in favor of the defendant C. Sewell Thomas and against the plaintiffs and the involuntary plaintiff in the sum of $2,500.00 and costs." (R. 189)

It might also be noted in passing that this judgment was entered in a proceeding in which Daniels and Hiskey, as plaintiffs, succeeded, after years of litigation, in obtaining from Thomas a conveyance to their own property. No judgment for costs was ordered against the other parties who were brought into the case to dispose of their interests.

(B) The legal principles which are applicable.

We consider that it would be unnecessary to argue in this court that a judgment obtained against the involuntary plaintiff McMullin under the circumstances above outlined was obtained against him without due process of law. In a recent case which arose in New York and which, like the present case, involved property held in trust, the requirements of due process as applicable to such facts as are involved in the case at bar, are stated so clearly and explicitly, as to leave no doubt that due process is here lacking. In *Mullane* v. *Central Hanover B & T Co.*, 339 U.S. 306, 94 L. ed. 865 (1950) Mr. Justice Jackson, speaking for the court, said (p. 313, 339 U.S.):

> "Many controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that

> deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"

and also (339 U.S. p. 314) that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citing authorities)

That an award of attorney's fees as costs in a case involving the disposition of trust property cannot be charged against the fund as of course and in the absence of a claim or demand therefor, and without a hearing, has been decided by this court in the case—which also originated in Colorado—of *Rude* v. *Buchhalter*, 286 U.S. 451, 76 L. ed. 1221 (1932).

In that case the Circuit Court of Appeals for the Tenth Circuit had under consideration on appeal the question of the disposition of a trust fund. The appellate court, on its own motion, without a claim therefor being made, and without a hearing, awarded the respondent Buchhalter a lien on the fund for his expenses and attorney's fees. In reversing the judgment of the Circuit Court of Appeals this Court said (286 U.S. at p. 460):

> "(Respondent) made no application for a lien upon petitioner's share on account of expenses or attorney's fees. Such allowances are not made of course, and petitioner had no reason to apprehend that any such matter would be considered on either appeal. He had no opportunity to be heard in respect of the authority of the court to make such an allowance or as to the facts touching the propriety of basis of the same."

This language applies exactly to the situation of the petitioner here.

Separate judgments as to the three judgment debtors were not entered. There is only one judgment against all three of them jointly. The record fails to provide any means by which the separate liabilities of the three judgment debtors can be determined. Under such circumstances the judgment is invalid as an entirety, and must be reversed as a whole and as to all of the petitioners.

4 Corpus Juris 1182, *Appeal and Error*, Sec. 3218, n. 38;
5 Corpus Juris Secundum 1419, *Appeal and Error*, Sec. 1919, n. 96;
3 Am. Jr. 692, *Appeal and Error*, Sec. 1185, n. 15;
33 Corpus Juris 1051, *Judgments*, Sec. 35;
49 Corpus Juris Secundum, *Judgments*, 27, Sec. 3;
Salisbury v. *LaFitte*, 22 Colo. App. 90, 108; 123 Pac. 124, 131 (1912);
Fulton Inv. Co. v. *Fraser*, 76 Colo. 125, 130; 230 Pac. 600, 602 (1912);
Ryan Gulch Res. Co. v. *Swartz*, 77 Colo. 60, 69; 234 Pac. 1059, 1062 (1925);
Irvin v. *Blair*, 100 Colo. 349, 352; 68 Pac. (2d) 28, 29 (1937);
Washington Gaslight Co. v. *Lansden*, 172 U.S. 534, 556 43 L. ed. 543, 552 (1898).

We can offer no explanation for the action of the Colorado courts excepting that they may have taken the position that in dealing with a trust property in *custodia legis* no notice or claim is necessary for the allowance of costs out of the property. However, as we have shown, that is not the correct rule. If such a rule could be sustained by authority it still would not apply here, for the judgment is not an award of costs out of a fund, but is a personal judgment against the three judgment debtors, one of whom had no interest in the fund.

BENTLEY M. MCMULLIN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 718

OMRI E. DANIELS, JR., BARGE HISKEY AND BENTLEY M. McMULLIN,

Petitioners,

vs.

C. SEWELL THOMAS

MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN TRANSCRIPT OF RECORD

May it please the Court:

Your petitioners respectfully pray that they may be permitted to present their petition for a writ of certiorari to the Supreme Court of the State of Colorado, to which petition this motion is attached and to which reference is hereby made, upon the copy of the typewritten transcript of the proceedings in said court certified by the Clerk of the Supreme Court of the State of Colorado, as filed herein, without having said record printed.

And as grounds for this motion your petitioners respectfully represent and show:

1. That the record in this case consists of four bound volumes of the record proper and that, in addition, there

are two volumes of exhibits, and that the whole record contains in excess of 300,000 words; that only a very small part of said record is in any way material to the issues to be presented upon said petition for a writ of certiorari; that the cost of printing all of said record, if the entire record should have to be printed, would amount to several thousands of dollars; and that none of your petitioners are men of means, or able easily to raise the amount that would be required for the printing of said entire record.

2. That as soon as the decision of the Supreme Court of the State of Colorado had become final, and in February, 1954, your petitioners wrote to the attorney for the respondent and attempted to agree with him as to what parts or portions of the record were material to the presentation of said petition for certiorari; that both the attorney for your petitioners, and the attorney for the respondent herein spent much time and effort on their attempt to agree as to what parts of the record were material, but were unable to do so, largely because, as your petitioners believe, the attorney for respondent was afraid that, by agreeing to the printing of a part only of the record he would agree to the omission of some part thereof essential to the proper presentation of his case; that said correspondence and efforts to agree continued down to Monday, April 19, 1954, without an agreement having been arrived at, and that on the following day the attorney for your petitioners left Colorado for Washington, D. C., to file said record, so that no further efforts to agree on what parts of the record should be printed were thereafter possible.

3. That your petitioner is informed that this Court has adopted amendments to its Rules and that said amendments will become effective July 1, 1954, and that said amendments provide that it shall not be necessary to print

the record, or a part thereof, upon petition for a writ of certiorari, but that after such rules become effective petitions for a writ of certiorari may be submitted on a typewritten certified transcript of the record.

4. That your petitioner is further informed that it is probable that this case will not come before this Court for its consideration until after the said amendments to said Rules have become effective and until after this court has begun to consider petitioners for a writ of certiorari on typewritten transcripts of the record, no part of which has been printed, so that when this case comes before this court for its consideration it will, if the record is not printed be presented in the same and like manner in which other cases, then before this Court for consideration, will be presented.

Respectfully submitted,

BARTLEY M. MCMULLIN,
Counsel for Petitioners.